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'I/A' ITEM NOTE

From: General Secretariat of the Council
To: Permanent Representatives Committee/Council

Subject: Draft DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL amending Directive (EU) 2017/1132 as regards cross-border
conversions, mergers and divisions (**first reading**)
- Adoption of the legislative act
= Statement

Statement by Estonia

Estonia welcomes the aim of the directive on cross-border conversions, mergers, and divisions to provide a legal and administrative environment, which is both conducive to growth and adapted to face the new economic and social challenges of a globalised and digital world, while ensuring the protection of employees, creditors and minority shareholders. Estonia acknowledges the potential benefit of such a legal framework. It has been a unique opportunity to create the much-needed legal framework to unleash the full potential of the single market and stimulate jobs, growth and investment.

Estonia, however, regrets that the aforementioned aims have not been fully achieved in the outcome of the interinstitutional negotiations. We remain deeply concerned that directive contains unclear and cumbersome obligations, which do not allow for the use of the full potential of the single market and might even have a deterring effect on companies, especially on SMEs. Moreover, the rules laid down in the directive do not take into account neither the rapidly developing business landscape nor the digital economy. In this context, Estonia particularly regrets the unequal treatment of companies established under different legal theories despite their legitimacy and equal status under Article 54 TFEU and settled case law (cases Polbud, C-106/06, paras 34 and 62, National Grid Indus, C-371/10, paras 26-27, Daily Mail, C-81/87, para 21). Taking this into account, it is not comprehensible why one system should be disadvantaged compared with the other. By creating a presumption whereby the absence of abuse or fraudulent behaviour by companies, which have their effective management and economic activity in the Member State of registration, is assumed, we are essentially creating a presumption that contemporary and global digital companies are, in fact, fraudulent or “shell companies”. This incentivizes progressive companies to register themselves outside of the single market, in countries with more modern and flexible legal environment. Therefore, we fear that such complex rules will result in companies searching for alternatives, bearing unpredictable consequences to employees, creditors and minority shareholders.

Furthermore, the directive on cross-border mergers has been well-functioning in practice for more than ten years. Thus, it remains unclear why the rules on cross-border mergers were not taken as a basis for cross-border conversions and divisions in the first place. Moreover, it is worrisome that the existing rules on cross-border mergers have been changed beyond what is necessary to solve the few practical problems detected. By making too many changes, we risk making the existing well-functioning rules on cross-border mergers ineffective, cumbersome and less attractive.